United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7383

To be argued by
ANTHONY L. TERSIGNI

United States Court of Appeals

FOR THE SECOND CIRCUIT

USACHEM, INC., a Texas Corporation,

Plaintiff-Appellant,

—against—

MELVIN R. WALDMAN and MELVIN R. WALDMAN d/b/a DYNACHEM,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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INDEX

PAGE

Preliminary Statement 1

Issues Presented 2

Statement of the Case 3

ARGUMENT:

POINT I—

The District Court's Denial of a Preliminary Injunction Is Inconsistent With the Applicable Principles Recently Defined by This Court and the Relevant Facts Conclusively Established by the Record 10

POINT II—

The Alleged Defenses Raised by Waldman Are Without Merit 19

CONCLUSION 23

ADDENDUM

Opinion of District Judge Freedman in USAchem, Inc. v. Arthur W. Solomon, July 16, 1975 ..... 1a

Memorandum of District Judge Freedman in USAchem, Inc. v. Arthur W. Solomon, August 1, 1975 ..... 9a

Order of Preliminary Injunction dated August 1, 1975 ..... 11a

Cases: PAGE

American Eutectic Welding Alloys Sales Co., Inc. v. Rodriguez, 480 F.2d 223, 226 (1st Cir. 1973) 10n

Dressler v. M V Sandpiper, 331 F.2d 130, 133 (2d Cir. 1964) 20

Housekeeper v. Lourie, 39 App. Div. 2d 280 (1st Dep't 1972), appeal dismissed, 32 N.Y. 2d 832 (1973) 20

National Chemsearch Corp. v. Bogatin, 233 F. Supp. 802 (E.D. Pa. 1964), vacated on other grounds, 349 F.2d 363 (3d Cir. 1965) 14

National Chemsearch Corp. v. Hanker, 309 F.Supp. 1278 (D.D.C. 1970) 21

New York Tel. Co. v. Jamestown Tel. Corp., 282 N.Y. 365 (1940) 20

Purchasing Associates v. Weitz, 13 N.Y. 2d 267, 274 (1963) 10n

Soviero Bros. Contracting Corp. v. City of New York, 286 App. Div. 435 (1st Dep't 1955), aff'd, 2 N.Y. 2d 924 (1957) 20

United States v. Idlewild Pharmacy, Inc., 308 F. Supp. 19 (E.D. Va. 1969) 20

USAchem, Inc. v. Goldstein, 512 F.2d 163 (2d Cir. 1975) 2, 10, 11, 12, 13, 15, 19, 21

USAchem, Inc. v. Solomon, Civil Action No. 75-1351-F 14, 15, 16, 21

Other Authority:

RESTATEMENT OF THE LAW OF CONTRACTS §484 20

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Preliminary Statement

This action was commenced by plaintiff-appellant USAchem, Inc. ("USAchem") on April 8, 1975. It seeks an injunction and damages for breach of a restrictive covenant and unfair competition by the defendant-appellee Melvin R. Waldman ("Waldman"), a former employee of USAchem. On June 2, 1975, USAchem moved for a preliminary injunction limited to that part of the restrictive covenant in which Waldman agreed not to solicit, sell or divert USAchem's customers in his assigned territory. USAchem appeals from the order of the United States District Court for the Northern District of New York (Foley, *J.*), entered June 17, 1975, which denied and dismissed USAchem's motion.

In *USAchem, Inc.* v. *Goldstein,* 512 F.2d 163 (2d Cir. 1975), this Court reviewed a similar restrictive covenant and held that it was valid to the extent that it prohibited defendant from soliciting former customers with whom he had done business in his assigned territory. However, the Court found that USAchem had been guilty of laches and further concluded, on the facts there presented, that irreparable injury had not been established.

In the present case, USAchem has proceeded expeditiously in seeking to enforce its right to a preliminary injunction. Furthermore, under the facts conclusively established by the present record, irreparable injury has been demonstrated. If a salesman like Waldman, USAchem's sixth best salesman out of approximately 1,200, can leave his employment with USAchem and, in violation of his restrictive covenant, systematically solicit his former customers without fear of injunction until after a trial, the sales structure of this corporation, upon which its success is built, will be jeopardized. It is for this reason that review by this Court of the order appealed from is of the utmost importance to USAchem.

Issues Presented

1. Was the denial of a preliminary injunction by the District Court consistent with the applicable principles defined by this Court in *USAchem, Inc.* v. *Goldstein* and the relevant facts established by the record?

2. Are the alleged defenses raised by Waldman of substance and sufficiently supported by the record to warrant denial of a preliminary injunction?

Statement of the Case

USAchem markets, sells and distributes chemical products throughout the United States.* It has established a valuable and extensive business throughout the country, including New York (6a).**

USAchem employs approximately 1,200 commission salesmen and a large part of its business depends upon the orders generated by them (*Ibid.*). These salesmen are furnished with various sales materials and supplies and are trained, aided and supervised by sales managers employed by USAchem (*Ibid.*).

USAchem's standard employment agreements for both salesmen and sales managers contain post-employment restrictive covenants which are deemed essential to USAchem's sales structure. USAchem's salesmen and sales managers receive training in selling approximately 300 different products developed to solve highly technical problems and needs of hundreds of varied industrial, manufacturing, institutional and municipal customers (135a-136a). By the nature of the business, USAchem's salesmen develop close personal relationships with its customers and represent the company's sole field contact with those customers. The company has found that it generally takes 18 months from the time a salesman leaves USAchem for his replacement to establish a customer relationship with the customers previously serviced by the former salesman (136a-137a).

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* These products include disinfectants, soaps, detergents, cleansers, paints, water treatments, maintenance chemicals, chemicals for the control of water pollution, chemicals for the improvement of turf, lawn and ground, insecticides, adhesives, glue, germicides, special coatings, degreasing and sanitary supply and floor maintenance materials and other related products.

** Numbers in parentheses refer to pages in the Joint Appendix.

Waldman was hired as a salesman in January of 1968. He held a B.A. Degree in Economics from Syracuse University and had attended one year of law school (140a). At one time he had also been a stockbroker trainee with Bache & Co. (130a, 140a). However, prior to his employment by USAchem, he had had no experience selling chemical products, except for insecticides which he had sold in a family retail store where he earned approximately $800 a month (67a, 81a). Waldman also had had no experience in selling to industrial or institutional accounts (*Ibid.*).

On January 19, 1968, Waldman and National Chemsearch Corporation of New York, Inc. (USAchem's predecessor) executed a Sales Representative's Agreement assigning to Waldman as his territory three up-state New York counties (Albany, Greene and Schoharie) (20a). Two additional counties (Rensselaer and Columbia) were added by a letter amendment dated May 22, 1972 (211a). Waldman's agreement provided that during his term of employment and for 18 months after its termination for any reason, he would not, himself or with others, solicit or divert the company's customers in his assigned territory (20a-21a).

While Waldman was to be paid commissions on an account-protected basis,* the territory assigned to him was not exclusive (198a, 200a). The company expressly reserved the right to do business in Waldman's assigned territory under various trade names and to employ other salesmen in that territory (20a). Waldman received a detailed explanation concerning the affiliated companies of National Chemsearch (now USAchem), including a company called Certified Laboratories (198a, 201a).

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* For a period of twelve months after a salesman sells to an account that account is "protected", *i.e.*, all commissions earned on that account accrue to that salesman (301a-302a).

After an initial period of training, Waldman began selling for USAchem and continued as a salesman until February 3, 1975, when he voluntarily resigned (151a, 199a).

On February 1, 1970, after Waldman had been employed for approximately two years, he also executed a District Sales Manager's Agreement, under which he agreed to train, assist and supervise salesmen of the company, for which he would earn (completely apart from the compensation that he had earned and would continue to earn as a salesman) a weekly salary of $[illegible]00 "or such other weekly salary or other compensation as the parties may from time to time hereafter agree upon" (24a). Over the ensuing period of approximately four years, Waldman trained and supervised a few USAchem salesmen pursuant to this agreement (263a-264a). In lieu of $200 per week, USAchem paid Waldman a 2% override commission on sales made by any salesman trained by him and who remained with USAchem for a designated period (147a, 260a, 263a-264a). Waldman accepted and retained such compensation, without objection(*Ibid.*). The District Sales Manager's Agreement contained restrictive covenants similar to those contained in the Sales Representative's Agreement, except broader in geographical scope (27a-30a).

During his employment with USAchem, Waldman proved to be an extremely successful salesman. He serviced approximately 350 accounts, making an average of twenty solicitations per day (95a, 137a). Waldman achieved one of the highest volumes of sales of any of the company's salesmen. Of the 1199 salesmen employed by USAchem in 1974, Waldman was the *sixth* largest earner (126a). His sales were 3.4 times the average among USAchem's entire sales force (*Ibid.*). Moreover, while USAchem ordinarily earns a net profit of 15.8% on its gross sales, Waldman was such a prolific salesman in terms of volume that USAchem earned 35.3% profit on his sales (125a-126a).

The following is a summary of Waldman's sales and compensation during his employment by USAchem (70a; Waldman Dep., pp. 34-53):

Year	*Sales*	*Compensation*
1969	$111,673	$34,310
1970	152,384	43,282
1971	182,560	50,590
1972	172,173	58,129
1973	202,626	65,879
1974	210,803	66,625

In addition to direct commissions on his own sales and the 2% override commission on sales by salesmen that he trained, Waldman received other financial compensation, including cash vacation awards, the right to participate in a stock plan and other benefits (149a, 259a-264a).

By 1974, Waldman's relationship and rapport with his customers became so strong that he decided to form his own company. On November 22, 1974, about two and a half months before he left USAchem's employ, he filed a certificate of conducting business under the name of Elite Products (121a). In January of 1975, while still employed by USAchem, Waldman began selling mops, brooms and brushes to USAchem's customers under the Elite name (68a, 77a).

As previously noted, on February 3, 1975, Waldman voluntarily resigned from his employment with USAchem (150a-151a, 199a). He stated he was leaving the chemical specialty sales business because he was "a nervous wreck and sick and didn't know what he was going to do" (199a). However, that very same morning he changed the name of Elite Products to "Dynachem" and filed a certificate of conducting business under that name (121a-1).

From the time he left USAchem, Waldman has, under the Dynachem name, systematically solicited and made sales of products similar to and in competition with USAchem's products to the very customers with whom he had dealt on behalf of USAchem (69a, 122a-124a). In doing so, he has used USAchem's customer lists and other customer information acquired by him while he was a USAchem employee (68a-69a).

On February 5, 1975, within two days of Waldman's resignation, Dynachem made its first deliveries (124a-1, 199a). The immediacy of these deliveries confirms that Waldman had organized and implemented his competing business while still employed by USAchem.

Between February 3, 1975 and May 27, 1975, Waldman made 184 sales. Of these sales, 169 were to USAchem customers. Waldman's total sales volume during this period was $34,870.98, of which $32,334.95 represents sales to customers formerly serviced by Waldman for USAchem (123a). Discovery has conclusively confirmed that a full 92% of Waldman's sales of competing chemical products have been to customers that he formerly sold on behalf of USAchem (*Ibid.*). Furthermore, Waldman has stated he intends to continue making such solicitations and sales unless he is enjoined from doing so by court order (69a, 113a-114a).

During the same period that Waldman was able to make sales of $32,334.95 to customers that he formerly sold on behalf of USAchem, USAchem itself was able to achieve only $7,464.25 (less than a quarter of Waldman's total) in sales to these customers (195a).

USAchem hired two salesmen, Edward Fawcett and David Waddington, to cover the areas formerly solicited by Waldman (193a, 204a-208a). With respect to the period

from February 3, 1975 through May 27, 1975, the record shows the following:

1. Fawcett made 52 solicitations of accounts formerly sold by Waldman on behalf of USAchem but could make only 14 sales totaling $3,883.60 (194a). By contrast, Waldman made 66 sales to these very same customers during the same period of time totaling $13,102.35 *(Ibid.)*.

2. In 25 out of the 52 solicitations by Fawcett, Waldman had sold the account ahead of Fawcett's call (*Ibid.*).

3. On March 25, 1975 one customer told Fawcett that it only bought by bid, but thereafter this same customer bought on direct invoice from Waldman (on April 10, 1975 and May 21, 1975) *(Ibid.)*.

4. Waddington made 40 solicitations of accounts formerly sold by Waldman on behalf of USAchem but could make only 10 sales totaling $1,340.65 (195a). By contrast, Waldman made 28 sales to these same customers totaling $7,130.85 *(Ibid.)*.

5. In 11 out of the 40 solicitations by Waddington, Waldman had sold the account ahead of Waddington's call *(Ibid.)*.

On March 21, 1975, counsel for USAchem wrote to Waldman, demanding that Waldman cease violating his restrictive covenant (124a-2).

On April 8, 1975, USAchem brought this action seeking injunctive relief and damages. Accelerated discovery was conducted and completed, only, however, after delay by Waldman and a subsequent order of the District Court directing disclosure, necessitated by Waldman's refusal to

produce records (Order of Judge Foley, dated May 28, 1975, listed as document #11 in the docket entries).

On June 2, 1975, USAchem moved for a preliminary injunction expressly limited to prohibiting Waldman from soliciting, selling, or diverting customers of USAchem which were within Waldman's former assigned territory and which were formerly sold by Waldman on behalf of USAchem (58a-1-62a).

On June 17, 1975, USAchem's motion was denied by the District Court, essentially on the following grounds:

1. In view of the three contractual writings between the parties, containing variations of the 18-month proscription, the court deemed it unclear "what the limitations on the geographical sales area are claimed to encompass" (313a).

2. In the court's view Waldman had raised serious claims, including the issue of the alleged breach by USAchem of the District Sales Manager's Agreement *(Ibid.)*.

3. In addition the court concluded that the balance of the equities and danger of irreparable harm strongly favored Waldman, since USAchem is not in jeopardy of extinction in the same manner as Waldman might be if an injunction should issue (312a).

On June 25, 1975, USAchem filed its notice of appeal from the District Court's denial of its motion for a preliminary injunction (316a).

ARGUMENT

POINT I

The District Court's Denial of a Preliminary Injunction Is Inconsistent With the Applicable Principles Recently Defined by This Court and the Relevant Facts Conclusively Established by the Record.

(1)

In *USAchem, Inc.* v. *Goldstein,* 512 F.2d 163, 168 (2d Cir. 1975), this Court held that the restrictive covenant used by USAchem in its salesmen agreements is valid to the extent that it prohibits a salesman "from soliciting former customers with whom he had done business in his assigned territory." * However, the Court concluded that USAchem was not entitled to an injunction because it had been guilty of laches and because, on the facts presented, irreparable harm had not been demonstrated. *Id.* at 168-69.

In the *Goldstein* case USAchem's former salesman had solicited his former customers immediately after he resigned from USAchem. There was evidence that in the first fifteen months of his independent operations Goldstein had obtained 81% of his business from his former accounts. However, it was also established that USAchem had replaced Goldstein with a salesman who, within a year, had managed to reach a level of sales almost equal to Goldstein's past records at USAchem. *Id.* at 168.

The Court noted that although Goldstein had started a competing business late in August 1972, USAchem did

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*This accords with well established New York law. *Purchasing Associates* v. *Weitz,* 13 N.Y. 2d 267, 274 (1963). See also *American Eutectic Welding Alloys Sales Co., Inc.* v. *Rodriguez,* 480 F.2d 223, 226 (1st Cir. 1973) (interpreting New York law).

not commence an action against him until December 11, 1972 and did not move for preliminary relief until February 22, 1973, some six months later. Furthermore, USAchem failed to appeal from the denial of its motion for a preliminary injunction until after the case was tried. *Id.* at 166, 168.

(2)

In the present case, USAchem has proceeded expeditiously. This action was brought promptly after discovery of Waldman's conduct, within two months after he terminated his employment with USAchem and began to solicit USAchem's customers. USAchem's motion for a preliminary injunction was made within two months after commencement of the action. Within eight days after its motion for a preliminary injunction was denied USAchem filed its notice of appeal.

By contrast, it has been Waldman who has sought to delay. Waldman's deposition was initially scheduled for April 17, 1975, but on his motion it was delayed until May 1, 1975 to permit him to gather documents. Then on May 1st Waldman refused to answer questions or produce any documents concerning his sales to USAchem's customers since February 3, 1975, on the ground that such material was irrelevant and confidential (in spite of the offer by USAchem's counsel to stipulate to hold such information in strict confidence) (64a-66a). Upon USAchem's subsequent motion to compel discovery, the District Court, on May 19, 1975, directed Waldman to answer the questions put to him and produce the required documents.

(3)

The facts conclusively established by the record in the present case also demonstrate that USAchem will suffer irreparable injury unless a preliminary injunction is granted prohibiting Waldman from soliciting USAchem's customers.

Waldman was an extraordinary salesman for USAchem. In 1974 he earned $66,625 on sales of $210,803. He was the sixth largest producer of the 1199 salesmen employed by USAchem.

Waldman concededly continues to solicit and sell the same customers he solicited when he was one of the most successful salesmen for USAchem. If he is not enjoined, there is every reason (including his own statements) to believe that he will systematically and successfully attempt to appropriate all of the many customers he formerly serviced for USAchem. The magnitude of Waldman's appropriation is revealed in the records of Waldman's sales in the four months after he left USAchem. During this period Waldman made sales totaling $34,870.98 of products which are similar to and in competition with USAchem's. A full 92% of his sales during this period were to USAchem's customers (169 out of 184 sales).

In marked contrast to Waldman's continually increasing sales, the *two* salesmen hired to replace Waldman have been able to make only approximately $7,000 worth of sales to Waldman's old customers. As demonstrated by the affidavits of Neal Young, Edward Fawcett and David Waddington, in numerous instances these customers refused to buy from Waldman's replacements because they had already purchased similar products from Waldman. The present situation is thus drastically different from the *Goldstein* case, where the Court observed that *one* replace-

ment alone "had managed to reach a level of sales almost equal to Goldstein's" (512 F.2d at 168).

It is clear, therefore, that USAchem cannot have a fair chance to keep its customers unless it is accorded the benefit of the period of non-competition for which it contracted. This is so because Waldman has exceptional ability as a salesman and special influence with his former customers. To these customers USAchem and Waldman were one and the same. Waldman has a long-established rapport with them and he has intimate knowledge of their purchasing requirements. It is obvious from Waldman's success in selling Dynachem products to his former USAchem customers that the customers at this point will buy from Waldman without regard to the brand of product.

What is so essential to USAchem's business is the opportunity to keep its established customers for the years to come. During the period before a trial on the merits can be had in this case, Waldman, unless enjoined, will be selling Dynachem products to his old customers. This would render it highly unlikely that USAchem would be able to regain these customers in the future. With every passing day the chance for a USAchem replacement to establish a relationship with Waldman's old customers becomes slimmer, if not impossible.

If an injunction is not issued now, injury to USAchem cannot be prevented by a later injunction after trial. An injunction after trial might remove Waldman's competition but it would still leave USAchem in a position where, instead of preserving ongoing customer relationships, it would have to try to reestablish such relationships after a lengthy hiatus, a far more difficult task.

Nor is there any way of calculating damages for lost profits in future years on accounts which USAchem would

have a fair chance of keeping if Waldman were enjoined now. There can be no question that the loss would be substantial, for sales to the customers involved totaled over $200,000 in each of the last two years.

The present and prospective harm to USAchem resulting from Waldman's continuing course of conduct, *i.e.*, sales already lost, future sales which may be lost beyond the period of the restrictive covenant, unauthorized use of customer information, etc., is not susceptible of measurement in monetary terms and falls within the classic definition of irreparable injury. *National Chemsearch Corp.* v. *Bogatin*, 233 F. Supp. 802 (E.D. Pa. 1964), *vacated on other grounds*, 349 F.2d 363 (3d Cir. 1965).

(4)

On July 16, 1975, the United States District Court for the District of Massachusetts granted a preliminary injunction to USAchem in a case which is very similar to the case at bar. *USAchem, Inc.* v. *Solomon*, Civil Action No. 75-1351-F (Freedman, *J.*)* In that case, USAchem brought an action to enforce a restrictive covenant against another of its salesmen, Arthur W. Solomon. That covenant, in essence, required that for a period of one year following termination of his employment Solomon would refrain from diverting USAchem's customers within an assigned territory consisting of four counties in western Massachusetts.

During the fifteen years that Solomon solicited customers for USAchem he had developed a successful route. As Judge Freedman stated: "It appears that his success in selling to industry, municipalities and institutions was due in large measure to his ability to develop close relationships

* A copy of Judge Freedman's decision, which is unreported, is included in the addendum to this brief.

with his regular customers" (Addendum, p. 2a). Solomon, like Waldman, became one of USAchem's leading salesmen. Like Waldman, in 1973 Solomon began to offer his customers products such as brooms and mops which were not available through USAchem. His sales of such items were made through a company he had formed, which he called Superior Industrial Products. USAchem was not informed of these activities and did not become aware of them until Solomon left USAchem's employ.

On January 20, 1975 (thirteen days before Waldman resigned), Solomon resigned from USAchem. He immediately began selling chemical specialty products to his former USAchem customers under the name of Superior Industrial Products. He solicited substantially all his old USAchem accounts. From January 20, 1975 through May 1975 Solomon made 159 sales to his old customers for a total of $36,842.76. Like Waldman, he also stated that he fully intended to continue to compete with USAchem for business from these customers unless enjoined by a court. USAchem sent three salesmen into two counties of Solomon's territory after his resignation. None was successful in handling USAchem's accounts in these counties.

In the *Solomon* case, as in the present case, USAchem requested a preliminary injunction which would bar Solomon only from soliciting "customers formerly sold to or solicited by defendant during the term of his employment with plaintiff" (Addendum, p. 5a). Solomon also raised many of the same defenses as Waldman to USAchem's request for a preliminary injunction.

Citing the decision of this Court in *USAchem, Inc.* v. *Goldstein, supra*, Judge Freedman concluded that the restrictive covenant was enforceable. The court also noted the special relationship Solomon had with his customers

and the fact that Solomon knew the special needs of his former customers, when they were likely to purchase, USAchem's price for the products he was selling, etc. (Addendum, p. 6a). The court further stated (Addendum, p. 7a):

> "I find that the injunction requested is reasonable in time and geographical scope. Further, plaintiff has demonstrated that it is necessary in view of its unsuccessful attempts to replace Solomon with new salesmen. *The sales made by defendant to former USAchem customers coupled with the plaintiff's actual and potential loss of good will establish the requisite irreparable harm. Moreover, the harm to defendant does not outweigh the loss to plaintiff.* Solomon can continue to solicit his old customers for business which is not proscribed in the injunction; he can sell even those proscribed products to new customers" (Emphasis supplied).

We submit that the same result reached by Judge Freedman in the *Solomon* case should be reached in the present case. USAchem does not seek to preclude any former employee from earning a livelihood. It seeks only to enforce reasonable restrictions necessary to protect its legitimate business interests.

The limited injunction sought against Waldman would not preclude him from soliciting USAchem's customers for non-competitive products, nor from soliciting anyone other than former customers for any product. Nor would such an injunction deprive him of the means of earning a living and supporting his family. Waldman has a college degree in economics and "8 very successful years of retailing [in which he] took [an] antiquated business, in [a] dead town, revitalized it [and] doubled volume and profit margin" (132a). With the experience gained during an employment

in which his sales volume was the sixth best of a total sales force of 1199 salesmen and in which his compensation exceeded $66,000 in the final year, Waldman should have very little trouble in making a living without violating his contract with USAchem and appropriating USAchem's customers. Since Waldman has thus far concentrated his efforts on selling to USAchem's customers, his record since February 3, 1975 gives little indication of his true potential for making sales on his own.

We respectfully submit that Judge Foley was in error in concluding that Waldman's business would be in jeopardy of extinction if an injunction were to issue in this case. Such a conclusion is not supported by the record. In addition, Judge Foley's evaluation of the relative possibilities for irreparable harm overlooked the fact that USAchem's business, although well established, cannot survive if it is subjected to piecemeal appropriation by salesmen (particularly good salesmen like Waldman) striking out on their own. USAchem stands to lose much more than Waldman because, while Waldman's business depends only on him, USAchem's business is completely dependent on a large sales force the feasibility of which would be destroyed if a reasonable competitive restriction cannot be enforced.

(5)

The District Court's opinion refers to "three contractual writings at issue" (308a). These writings consist of two basic contracts, *i.e.*, the Sales Representative's Agreement of January 19, 1968 and the District Sales Manager's Agreement of February 1, 1970, plus a letter amendment to the Sales Representative's Agreement, dated May 22, 1972.

The Sales Representative's Agreement provided that for an 18-month period after termination of his employment

Waldman would be prohibited from soliciting or diverting USAchem's customers in his assigned territory, then consisting of Albany, Greene and Schoharie Counties (20a-21a). The letter amendment of May 22, 1972 added Rensselaer and Columbia Counties to Waldman's assigned territory (211a).

While the District Sales Manager's Agreement set forth additional restrictions (27a-30a, 32a-33a), it expressly provided that the restrictive covenants of the Sales Representative's Agreement would remain in full force and effect (32a-33a). It is clear, therefore, that the covenants of both agreements were supplemental to one another and were intended to exist concurrently (33a). This is further evidenced by the fact that the Sales Representative's Agreement was amended some two years *after* execution of the District Sales Manager's Agreement to add two counties to Waldman's assigned territory as a *salesman* (211a).

As previously noted, Judge Foley concluded that by reason of the interrelation of these three writings doubt was created with respect to "what the limitations on the geographical sales area are claimed to encompass" (313a). We respectfully submit, however, that USAchem's motion raised no issue involving geographical sales area. The limited injunction sought by USAchem simply relates to customers formerly serviced by Waldman, not any geographical area as such.

All of Waldman's former customers were customers solicited by him within the territory assigned to him by USAchem. Under any reading of the restrictive covenants in issue, Waldman is not entitled to solicit or divert these customers and he should be enjoined from doing so.

POINT II

The Alleged Defenses Raised by Waldman Are Without Merit.

(1)

Waldman asserts that the Sales Representative's Agreement, which he signed in January of 1968, is invalid because he never read the contract, was discouraged from taking it home for review before he signed it or from having it reviewed by a lawyer and because the explanation of the contract given to him did not warn him fully of what he was signing (144a). However, Waldman was a college graduate, who had also completed one year of law school and had spent eight very successful years running a retail business. The fact that he may not have read the contract or that he may have been discouraged from bringing the contract home or discussing it with an attorney is clearly irrelevant.

Waldman further asserts that the contracts he signed were unconscionable in that he was allegedly subject to a worldwide prohibition of the sale of chemical products (144a). In fact, the only relief sought against him relates to his diverting of customers formerly serviced by him for USAchem. See *USAchem, Inc.* v. *Goldstein, supra.*

Waldman alleges that under intense pressure he was coerced into signing the District Sales Manager's Agreement (147a). The intense pressure that Waldman refers to is nowhere substantiated. It is quite clear from the terms of the agreement that it was terminable at will and that Waldman could have terminated the contract at any time. However, he chose not to do so and indeed accepted the 2% override commissions paid to him under the agreement for four years.

Furthermore, even had there been something objectionable about the contracts in question or their execution, any right to rescind on such grounds could only have been exercised within a reasonable time thereafter. *United States* v. *Idlewild Pharmacy, Inc.*, 308 F. Supp. 19 (E.D. Va. 1969); *New York Tel. Co.* v. *Jamestown Tel. Corp.*, 282 N.Y. 365 (1940). By electing to continue his employment with USAchem, collecting commissions under the Sales Representative's Agreement for seven years and collecting the 2% override commissions under the District Sales Manager's Agreement for four years, Waldman clearly ratified these contracts. RESTATEMENT OF THE LAW OF CONTRACTS §484.

Where a party elects to continue with a contract allegedly fraudulently induced, he accepts all the burdens contained in the contract as well as the benefits. *Soviero Bros. Contracting Corp.* v. *City of New York*, 286 App. Div. 435 (1st Dep't 1955), *aff'd*, 2 N.Y. 2d 924 (1957). *Cf. Housekeeper* v. *Lourie*, 39 App. Div. 2d 280 (1st Dep't 1972), *appeal dismissed*, 32 N.Y. 2d 832 (1973). Waldman's eleventh-hour attempt to raise the issues of fraud and undue pressure in the execution of the contracts should be rejected. *Cf. Dressler* v. *M V Sandpiper*, 331 F.2d 130, 133 (2d Cir. 1964).

(2)

Waldman also asserts that USAchem breached the Sales Representative's Agreement and the District Sales Manager's Agreement in various ways. He claims that soon after he was employed by USAchem he found that there were salesmen from one of its other divisions, Certified Laboratories, who were selling products within his assigned area (146a). Although not stated, it would appear that Waldman is alleging that he had an exclusive-area

contract and that the Certified Laboratories salesmen were violating his area. However, the record shows that Waldman was told about the existence of all of the divisions of USAchem, including Certified Laboratories, before he signed the Sales Representative's Agreement (197a-201a). It is also clear that the contract did not give Waldman an exclusive territory. Waldman's sales were on an account-protected basis. See *National Chemsearch Corp.* v. *Hanker*, 309 F.Supp. 1278 (D.D.C. 1970). Furthermore, as previously noted, under the Sales Representative's Agreement the company expressly reserved the right to conduct business in Waldman's assigned territory under various trade names and to employ other salesmen in that territory (20a). It should also be noted that a similar alleged defense was rejected both in *USAchem, Inc.* v. *Solomon*, *supra* and *USAchem, Inc.* v. *Goldstein*, *supra*.

Waldman's assertion that USAchem's price increases made it more difficult for him to make sales does not establish any breach of contract on USAchem's part (148a). His claim that USAchem breached its contract by stopping its voluntary practice of paying half the freight charges for some of Waldman's accounts is clearly erroneous (149a). Waldman's contention assumes that because USAchem at one time voluntarily paid half the freight charges on certain accounts, it was required to continue to pay such freight charges indefinitely. There is absolutely no support for this assertion.

Waldman also asserts that the Sales Representative's Agreement was breached because the cash allowance for his vacation award at the end of 1974 was less than the cash allowance for a similar award in 1973, even though his 1974 sales were higher than his 1973 sales (149a). However, any award for sales, whether in the form of a vacation or a cash allowance, as well as the amount of

the allowance, was within the discretion of USAchem and was not part of Waldman's contract. Indeed, the cash value of the vacation was not tied directly to sales nor is it even alleged to have been so (*Ibid.*).

Waldman alleges that pursuant to the District Sales Manager's Agreement he was to receive a salary of $200 per week *and* a 2% override commission on those salesmen whom he supervised (150a). He further states that he never received the $200 per week and that at the end of 1974 the 2% override was terminated (*Ibid.*). Waldman's assertion is belied by Paragraph 1 of the agreement which states that he would be paid "a weekly salary of TWO HUNDRED DOLLARS ($200.00) *or* such other weekly salary or other compensation as the parties may from time to time hereafter agree upon" (emphasis added) (24a). During the four years subsequent to the execution of the District Sales Manager's Agreement, Waldman never once complained that he was not receiving the $200 per week. It is also quite clear from the agreement itself that it was terminable at will and that Waldman could have terminated the contract at any time, if he was dissatisfied (24a-33a).

CONCLUSION

The order of the District Court should be reversed and USAchem's motion for a preliminary injunction granted, with costs.

August 15, 1975.

Respectfully submitted,

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ADDENDUM

Opinion

July 16, 1975

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 75-1351-F

USACHEM, INC., a Texas Corporation

v.

ARTHUR W. SOLOMON

FREEDMAN, *D.J.*

This matter is presently before the Court on plaintiff's motion for preliminary injunction. The parties have filed memoranda as well as affidavits and depositions. In accordance with Fed.R.Civ.P. 52(a), the Court hereinafter sets forth its findings and conclusions.

USAchem, Inc. ("USAchem") has brought this motion seeking to enforce a non-competition clause in its employment contract with defendant Solomon. The clause in issue is set forth in the margin.[1] In essence, it requires that

[1] 2. NOW, THEREFORE, in consideration of the premises and for ONE DOLLAR, cash in hand paid, receipt of which is hereby acknowledged, and said Party's employment under the terms of this agreement, Second Party expressly covenants and agrees that during the term of his employment and for a period of one year immediately following the expiration or termination of such employment with or without cause, he will at no time for himself or on behalf of any other person, persons, partnership or corporation, solicit disinfectant, soap, cleaners, insecticides, degreasing,

Solomon refrain from competing with USAchem within a specific four-county area in western Massachusetts for a period of one year following termination of his employment.

Solomon went to work for USAchem's predecessor, National Disinfectant Company of Missouri, in 1960 as a salesman of what has been variously described as janitorial supplies and chemical specialties. At the time there was no established customer list in his territory. Although he received little in the way of formal training, during the next few years Solomon developed a successful sales route. It appears that his success in selling to industry, municipalities and institutions was due in large measure to his ability to develop close relationships with his regular customers. He received little in the way of leads from his company, but was kept up to date on new product lines and regularly attended company sales meetings. Defendant became one of plaintiff's leading salesmen of approximately 1000 throughout the country. Both parties concede that the business is a highly competitive one.

USAchem has two unincorporated divisions selling chemical specialties—National Chemsearch and Certified Lab-

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sanitary supply and floor maintenance materials and equipment business within the territory assigned, viz: the following counties in the State of Massachusetts: Franklin, Berkshire, Hampshire, and Hampden—nor within said time will he in any way, directly or indirectly, for himself or on behalf of or in conjunction with any other person, persons, partnership or corporation, solicit, divert or take away any of First Party's customers or the business or patronage of any such customers located within said assigned territory; and Second Party does further covenant that he will not directly or indirectly for himself or on behalf of others engage in the disinfectant, soap, cleaners, insecticide, degreasing, sanitary supply and floor maintenance materials and equipment business or any phase thereof, within such territory, within one year from the termination thereof.

oratories. Solomon worked for National Chemsearch, and his territory had no other salesmen from that division. However, in the past few years Certified Laboratories had begun putting its salesmen in the area. The two divisions sell many of the same products at the same prices under different trade names. At the time Certified began its activities in his territory, Solomon complained to management. These complaints were unavailing, but defendant continued to sell successfully despite the competition from Certified. During 1973 and 1974 Certified salesmen sold more than $40,000 worth of chemical specialties to 60 customers listed in Solomon's route book.

In 1973 defendant began to offer his customers certain industrial products such as brooms, mops, etc., which were not available through USAchem. His sales of such items were through a company he had formed which he called Superior Industrial Products. Solomon indicates that he sold only those products not available through his employer and that it was done more as an accommodation to his customers than to promote a new business. Plaintiff was not informed of these activities by defendant and did not become aware of it until after Solomon's termination in 1975.

In 1974 plaintiff's prices were increased on several occasions and by the final increase the prices had risen approximately 50%. Solomon was receiving more and more complaints on the higher prices and in May 1974 began contemplating leaving plaintiff's employ. By August 1974 —the date of the final price hike—he had begun looking for other suppliers for the chemical specialties he sold to his customers. Because of objections to USAchem prices from customers he had sold non-USAchem products on several occasions prior to leaving his job with plaintiff.

Defendant resigned from USAchem on January 20, 1975. He immediately began soliciting his former USAchem customers under the name of Superior Industrial Products. By this time he had arranged for new supplies of chemical specialty items. Defendant did not inform plaintiff that he was so engaged. In fact, when asked, he told USAchem that he was going to sell welding rods.[2] Since January 20, 1975, Solomon has solicited substantially all his old USAchem accounts. He has stated that he fully intends to continue to compete with USAchem for business from these customers unless enjoined by a court.

Plaintiff has sent three salesman into Solomon's territory since his resignation. None have been successful; all have either quit or been terminated. These three only solicited customers in Hampden and Hampshire Counties; plaintiff's telephone division has attempted to handle the better accounts in Franklin and Berkshire Counties.

A threshold question is whether Texas or Massachusetts laws should be used in a resolution of this issue. The contract provides that Texas law is to be applied. But for this contract provision, Massachusetts law would clearly apply. However, since both parties agree that the law is the same in both fora, it is unnecessary to decide the issue. The Court proceeds directly to the merits.

The long-standing test for determining whether a preliminary injunction should issue was recently restated by the United States Supreme Court:

> The traditional standard for granting a preliminary injunction requires the plainitff to show that in the

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[2] Defendant did negotiate for such a position but, while he did sell $50—$100 worth of such rods, did not go into the business on a serious basis.

absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits. It is recognized, however, that a District Court must weigh carefully the interests of both sides. *Doran* v. *Salem Inn Inc.*, 43 U.S.L.W. 5039, 5042 (U.S. June 30, 1975).

While it is true that Courts do not favor non-competition agreements which interfere with an individual's means of livelihood, *Club Aluminum Co.* v. *Young*, 263 Mass. 223 (1928), it is well settled that such agreements are enforceable if reasonable and necessary. *Blackwell* v. *E.M. Helides, Jr., Inc.*, 1975 Mass. Adv. Sh. 2133; *All Stainless, Inc.* v. *Colby*, 1974 Mass. Adv. Sh. 329; *Weatherford Oil Tool Company, Inc.* v. *Campbell*, 340 S.W. 2d 950 (Tex. 1960).

Turning to the facts of the present case, the Court notes that plaintiff is not seeking an injunction as broad as that provided for in the agreement. The non-competition clause prohibits solicitations of chemical specialty business within the four-county area for a period of one year. The requested injunction would only bar defendant from soliciting ". . . customers formerly sold to or solicited by defendant during the term of his employment with plaintiff." [3]

Plaintiff argues that it has been unable to get back into the market in western Massachusetts due to defendant's activities. With respect to two of the counties—Hampden and Hampshire—it has made attempts through three salesmen to solicit its old customers and none of these efforts have been successful. USAchem points out that from Jan-

[3] On the other hand, the Court notes that the requested injunction included certain products not noted in the agreement. I will not impose an injunction the terms of which are broader than those of the contract. Any injunction which may issue will include only those chemical specialty items specified in the agreement.

uary 20, 1975 through May 1975, Solomon had made 159 sales to its old customers for a total of $36,842.76.

Solomon was employed to solicit customers in this territory for nearly fifteen years. While it is true that the names of his customers are available in the Yellow Pages, *see USAchem Inc.* v. *Goldstein*, 512 F.2d 163 (2nd Cir. 1975), there is much more to the relationship than that. He knows the special needs of the customers, when they are likely to purchase, USAchem's prices for the products he is selling, etc. Many of these same considerations were relied upon by the First Circuit in enforcing a similar non-competition clause. *See American Eutectic Welding Alloys Sales Co., Inc.* v. *Rodriguez*, 480 F.2d 223, 226 (1973), (applying New York law).

The same or similar clauses have been held valid and enforceable by a number of courts applying both Texas law as well as that of other states. *National Chemsearch Corp. of New York, Inc.* v. *Bogatin*, 233 F. Supp. 802 (E.D. Pa. 1964) (Texas law); *Certified Laboratories of Texas, Inc.* v. *Rubinson*, 303 F. Supp. 1014 (E.D. Pa. 1969) (Pennsylvania law). *National Chemsearch Corp. of New York* v. *Hanker*, 309 F. Supp. 1278 (D. D.C. 1970) (Texas law); *National Chemsearch Corp. of Missouri* v. *Schultz*, 173 U.S.P.Q. 218 (N.D. Ind. 1972) (Texas law). The Second Circuit found that the covenant was valid to the extent that it precluded a former salesman from soliciting his former customers. *USAchem, Inc.* v. *Goldstein, supra*, at 168. That court went on to find that USAchem was entitled to no relief since it was not diligent in pursuing its claim for an injunction.[4]

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[4] *USAchem, Inc.* v. *Waldman*, (N.D. N.Y. June 17, 1975), which followed in the wake of the *Goldstein* decision, refused to issue a preliminary injunction. The case involved three contracts which complicated the issue. More importantly, that court found no irreparable harm on the facts of that case.

Solomon's defense to this claim, beyond alleging that an injunction is both unreasonable and unnecessary, is that plaintiff had breached the employment contract by taking away his "exclusive" territory and by raising prices to an unreasonable level. Neither the placing of Certified Laboratories salesmen in his territory nor raising prices constitutes a breach which would excuse performance under the agreement.

I find that the injunction requested is reasonable in time and geographical scope. Further, plaintiff has demonstrated that it is necessary in view of its unsuccessful attempts to replace Solomon with new salesmen.[5] The sales made by defendant to former USAchem customers coupled with the plaintiff's actual and potential loss of good will establish the requisite irreparable harm. Moreover, the harm to defendant does not outweigh the loss to plaintiff. Solomon can continue to solicit his old customers for business which is not proscribed in the injunction; he can sell even those proscribed products to new customers.

The Court thus concludes that an injunction is appropriate. There remains the issue of how long this injunction should remain in effect. The agreement provided that the period of non-competition should run for one year from the date of termination. However, defendant has continued to compete, ignoring the clear provisions of the contract. For this inequitable conduct to be rewarded by a shorter period of injunction than one year would

[5] However, the necessity for the injunction is only present as to those customers with whom defendant has developed the special kind of relationship to which the Court referred earlier in this Opinion. For this purpose I define as USAchem customers those to whom Solomon has sold merchandise within the last year or whom he has solicited more than once within the past year, whether or not the solicitation resulted in a sale.

be an improper application of the rules of equity. The Court orders that the injunction is to be in effect for one year from its date of entry or until further order of this Court.

In accordance with Fed.R.Civ.P. 65(c), the Court orders that plaintiff file a bond in the amount of $65,[illegible]50. Plaintiff is to prepare and submit for the Court's approval a form of order consistent with this opinion.[6]

FRANK H. FREEDMAN
United States District Judge

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[6] For purposes of the injunctive order the Court suggests that the parties pay particular attention to n. 3 and n. 5, *supra*.

Memorandum

August 1, 1975

UNITED STATES DISTRICT COURT

District of Massachusetts

Civil Action No. 75-1351-F

USAchem, Inc., a Texas Corporation

v.

Arthur W. Solomon

Freedman, *D.J.*

The Court wishes to clarify several aspects of the injunction filed this date.

1. After careful consideration, I have determined that plaintiff is not entitled to an injunction for those customers which defendant has only solicited and has not sold to in the year prior to January 20, 1975. Paragraph 1a. of the Order reflects this change.

2. I stated in my Opinion of July 16, 1975, that defendant could "continue to solicit his old customers for business which is not proscribed in the injunction." I have added the last sentence to paragraph 1b. in order to ensure that the situation as to defendant's old customers is clear.

3. It is the Court's understanding that the bond as drafted will indemnify defendant for losses incurred should

the Court of Appeals determine that this Court erred in issuing the preliminary injunction. If that is not the case, plaintiff is ordered to substitute a bond which reflects this Court's understanding.

4. Although the Court appreciates that governmental agencies, schools, hospitals and other non-profit organizations might well gain benefits by dealing with defendant rather than plaintiff, the Court sees no reason why defendant should be relieved from his own contractual obligation in this area and yet be bound in all others.

FRANK H. FREEDMAN
United States District Judge

Order of Preliminary Injunction

August 1, 1975

UNITED STATES DISTRICT COURT

District of Massachusetts

Civil Action No. 75-1351-F

USAchem, Inc., a Texas Corporation

v.

Arthur W. Solomon

Freedman, *D.J.*

This matter comes before the Court on plaintiff's application for a preliminary injunction on June 18, 1975. During the course of an evidentiary hearing held in Boston, Massachusetts on said date, the Court heard and considered the evidence, including depositions, affidavits and other documentary evidence, and briefs and oral arguments submitted and presented by the parties. In accordance with the Opinion of the Court dated July 16, 1975, and the findings of fact and conclusions of law contained therein, it is hereby Ordered:

1. That the defendant, Arthur W. Solomon, his agents, servants, employees, attorneys, and all persons in concert or participation with him, are hereby restrained and enjoined during the pendency of this action and until further order of this Court, but not to exceed twelve (12) months from the date of entry of this Order, within the

counties of Berkshire, Franklin, Hampden and Hampshire in the Commonwealth of Massachusetts, from:

a. Directly or indirectly soliciting or selling, or attempting to solicit or offer for sale for himself or on behalf of any other person, persons, partnership or corporation, disinfectant, soap, cleansers, insecticides, degreasing, sanitary supply and floor maintenance materials and equipment business or any phase thereof to any customer sold to by defendant on behalf of plaintiff within one year prior to January 20, 1975.

b. Directly or indirectly, for himself or on behalf of or in conjunction with any other person, persons, partnership or corporation, soliciting, diverting or taking away from plaintiff any of said customers or the business or patronage of any of said customers. This order applies only to those products listed in paragraph a; defendant is free to sell products other than those so listed to the customers defined in paragraph a.

2. That in accordance with Rule 65(c) of the Federal Rules of Civil Procedure, this preliminary injunction is issued upon condition that plaintiff file a bond in the sum of $65,000, and said bond having been filed and approved by the Court, this Order is effective upon entry.

FRANK H. FREEDMAN
United States District Judge

AFFIDAVIT OF SERVICE BY MAIL

State of New York,

City of New York,

County of New York, ss.:

Alfred Bush Jr.,being duly sworn, deposes and says that he is over 18 years of age. That on the 15th day of August, 1975, he served 1 copy of Appendix and 2 copies of Brief upon:

O'Connell & Aronowitz, P.C.
Attorneys for Defendant-Appellee
100 State Street
Albany, New York 12207
(518) 462-5601

By depositing 3 copies of the above-same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Greenwich and Vestry Streets, addressed to said attorneys for the above-named, that being the address within the state designated by them for that purpose upon the preceding papers as the place where they regularly kept office and at which they regularly received mail.

Sworn to before me this

15th day of August, 1975

ABRAHAM L. MEILEN
NOTARY PUBLIC, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1976

Alfred Bush